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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF ALASKA**
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12 **UNITED STATES OF AMERICA,**

13 **Plaintiff,**

14 **vs.**

15 **NORTH MAIL, INC., GEORGE**
16 **O'BRIEN, COLLEEN VAN VLEET,**
17 **and THE MUNICIPALITY OF**
18 **ANCHORAGE,**

19 **Defendants.**
20

3:14-CV-00142 JWS

ORDER AND OPINION

[Re: Motion at docket 43]

21 **I. MOTION PRESENTED**

22 At docket 43, Plaintiff United States of America (the "Government") moved for
23 summary judgment against George O'Brien ("George") and Colleen Van Vleet
24 ("Colleen"; collectively, "Defendants") pursuant to rule 56 of the Federal Rules of Civil
25 Procedure. Specifically, the Government seeks an order setting aside the transfer of
26 the subject property owned by Defendants and directing that the proceeds from the sale
27 of the property are distributed to the Government in partial satisfaction of Defendant
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1 North Mail, Inc.'s ("North Mail") unpaid tax liabilities.¹ Defendants oppose at docket 49.
2 The Government replies at docket 53. Oral argument was not requested and would not
3 be of assistance to the court.

4 **II. BACKGROUND**

5 North Mail operated as a mailing service provider, maintaining contracts with
6 large organizations that had high-volume mailing requirements and also franchise
7 agreements with two companies that provided mailing supplies to other companies. It
8 was started by Kenneth O'Brien, who had three children: Dennis O'Brien ("Dennis") and
9 Defendants, George and Colleen. Kenneth O'Brien combined North Mail with a similar
10 business owned by Dennis and thereby Dennis obtained a 49% interest in North Mail
11 with Kenneth retaining a 51% interest. When Kenneth retired he divided his shares
12 equally between his three children; Dennis ended up with about two-thirds of North Mail
13 shares while George and Colleen each owned about 17%.

14 In 1998 North Mail purchased a property located at 5720 B Street in Anchorage,
15 Alaska (the "Property"). On May 26, 2011, North Mail transferred the Property to its
16 minority shareholders, George and Colleen. In exchange for the Property, George and
17 Colleen relinquished their shares to Dennis and North Mail, and they agreed to drop a
18 lawsuit that they had filed against Dennis regarding his mismanagement of North Mail.
19 North Mail leased the Property back from George and Colleen for \$6,000 a month and
20 also agreed to be responsible for an IRS lien and a Municipality of Anchorage lien that
21 were recorded against the property. North Mail never paid the rent and was evicted
22 from the Property. It ceased operations in September of 2011 with unpaid employment
23 and income tax liabilities totaling more than \$9 million. The Government now seeks to
24 invalidate the transfer of the Property to George and Colleen as a fraudulent
25 conveyance so that all the proceeds of the subsequent sale of the Property, \$436,654,
26 can be used in partial satisfaction of the judgment against North Mail. In a related but
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28 ¹The court previously entered default judgment against North Mail, Inc. at docket 33.

1 separate argument, the Government also asserts that two other tax liens totaling a little
2 over \$250,000 were assessed prior to the Property transfer, and while the liens were
3 not recorded, the Government argues they should nonetheless have priority over
4 Defendants' interest in the Property because Defendants cannot be considered valid
5 "purchasers" under the applicable statute due to a lack of adequate consideration.

6 **III. STANDARD OF REVIEW**

7 Summary judgment is appropriate where "there is no genuine dispute as to any
8 material fact and the movant is entitled to judgment as a matter of law."² The
9 materiality requirement ensures that "only disputes over facts that might affect the
10 outcome of the suit under the governing law will properly preclude the entry of summary
11 judgment."³ Ultimately, "summary judgment will not lie if the . . . evidence is such that a
12 reasonable jury could return a verdict for the nonmoving party."⁴ However, summary
13 judgment is mandated "against a party who fails to make a showing sufficient to
14 establish the existence of an element essential to that party's case, and on which that
15 party will bear the burden of proof at trial."⁵

16 The moving party has the burden of showing that there is no genuine dispute as
17 to any material fact.⁶ Where the nonmoving party will bear the burden of proof at trial
18 on a dispositive issue, the moving party need not present evidence to show that
19 summary judgment is warranted; it need only point out the lack of any genuine dispute
20 as to material fact.⁷ Once the moving party has met this burden, the nonmoving party
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22 ²Fed. R. Civ. P. 56(a).

23 ³*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

24 ⁴*Id.*

25 ⁵*Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

26 ⁶*Id.* at 323.

27 ⁷*Id.* at 323-25.

1 must set forth evidence of specific facts showing the existence of a genuine issue for
2 trial.⁸ All evidence presented by the non-movant must be believed for purposes of
3 summary judgment, and all justifiable inferences must be drawn in favor of the
4 non-movant.⁹ However, the non-moving party may not rest upon mere allegations or
5 denials, but must show that there is sufficient evidence supporting the claimed factual
6 dispute to require a fact-finder to resolve the parties' differing versions of the truth at
7 trial.¹⁰

8 **IV. DISCUSSION**

9 Defendants do not dispute that North Mail was having financial problems in late
10 2010. They knew that North Mail had quit paying a monthly retirement payment owed
11 to Kenneth O'Brien and that some employees' paychecks had bounced. They also
12 knew in November of 2010 that there was an IRS investigation regarding unpaid
13 employment taxes. They assert that Dennis prevented them from inquiring into the
14 business's financial status. Colleen independently obtained the company's bank
15 statements and learned that Dennis had been diverting North Mail's income for his
16 personal use. Colleen and George hired a lawyer and began discussing possible
17 settlements and strategies for getting North Mail back on track. Defendants assert that
18 they believed North Mail should be profitable because of its long-term contracts.
19 Defendants state that Dennis failed to cooperate, and therefore, they filed a lawsuit
20 against him in May of 2011 regarding his diversion of North Mail funds and other
21 corporate malfeasance.

22 On May 26, 2011, Dennis agreed to a settlement whereby the Property, worth
23 about \$500,000, would be transferred to Defendants. The consideration for the
24 Property was stated to be Defendants' surrender of their one-third ownership in North
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26 ⁸*Anderson*, 477 U.S. at 248-49.

27 ⁹*Id.* at 255.

28 ¹⁰*Id.* at 248-49.

1 Mail, which then gave Dennis sole control of the business, and the release of all claims
2 arising out of Dennis's mismanagement of the company. Based upon a 1999
3 shareholders agreement which valued the company at \$1.5 million, Defendants
4 believed that their portion of the business was worth \$500,000, or \$250,000 each.

5 At the time of the transfer there were two recorded liens on the Property: 1) one
6 in favor of the Municipality of Anchorage for unpaid property taxes; and 2) the other one
7 in favor of the IRS for unpaid FICA employment taxes for the tax period September 30,
8 2010, which was assessed on January 31, 2011, and recorded against the Property on
9 February 28, 2011. Defendants were aware of these two liens and acknowledged that
10 the Property was subject to these liens when they obtained the Property from North
11 Mail, but as part of the settlement agreement with Dennis, North Mail and Dennis
12 remained responsible for paying the debt. It is also undisputed that on May 9, 2011,
13 the Government made an assessment against North Mail for unpaid FICA employment
14 taxes for the period December 31, 2010, and that on May 16, 2011, it made an
15 assessment against North Mail for unpaid FUTA unemployment taxes for the 2010 tax
16 period.¹¹ However, federal tax liens based on these assessments were not recorded
17 against the Property. Defendants assert that they did not know about these
18 assessments. After the transfer of the Property, some time in 2013, a federal tax lien
19 for millions of dollars was levied against North Mail based on unpaid income tax for the
20 years 2007, 2008, and 2009.

21 **A. Priority of liens**

22 If a taxpayer has failed to pay a tax after demand for payment, then a federal tax
23 lien arises at the time of the assessment and attaches to all property and rights to
24 property of the taxpayer on the date of the assessment.¹² When a state-law claim and
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26 ¹¹As of March 13, 2015, the amounts due on these two assessments were \$142,345.34
27 and \$111,039.36, respectively.

28 ¹²26 U.S.C. §§ 6321, 6322.

1 a federal tax lien compete for priority, federal law controls, and federal law follows the
2 principle that first in time is first in right.¹³ There are exceptions. A federal tax lien is not
3 valid against any purchaser until notice of the lien is duly recorded.¹⁴ A purchaser is
4 defined as “a person who, for adequate and full consideration in money or money’s
5 worth, acquires an interest . . . in property which is valid under local law against
6 subsequent purchasers without actual notice.”¹⁵ “[T]he term ‘adequate and full
7 consideration in money or money’s worth’ means a consideration in money or money’s
8 worth having a reasonable relationship to the true value of the interest in property
9 acquired.”¹⁶

10 Here, there was one IRS lien recorded against the Property at the time of the
11 transfer, and there is no dispute that this recorded lien takes priority over Defendants’
12 interest in the Property. The amount of liability associated with that lien as of March 31,
13 2015, is \$61,878.11. The Government argues, however, that the assessment made
14 against North Mail on May 9, 2011, and the assessment made against North Mail on
15 May 16, 2011—both arising before the transfer of the Property to Defendants—created
16 liens on the Property as of the date of assessment pursuant to federal law and that
17 these two liens, while not recorded, also take priority over Defendants’ interest in the
18 Property because Defendants did not provide adequate consideration for the Property
19 to be considered valid purchasers who would be exempt from the federal lien.

20 As noted above, the stated consideration for the Property was relinquishment of
21 Defendants’ shares in North Mail, which Defendants valued at \$500,000 total (\$250,000
22 for each of their one-third ownership interest), and their claims against Dennis for his
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24 ¹³See *Quality Loan Serv. Corp. v. 24702 Pallas Way*, 635 F.3d 1128, 1134 (9th Cir.
25 2011).

26 ¹⁴26 U.S.C. § 6323(a).

27 ¹⁵26 U.S.C. § 6323(h)(6).

28 ¹⁶26 C.F.R. § 301.6323(h)-1(f)(3).

1 corporate malfeasance in relation to North Mail. However, this consideration flows to
2 Dennis and not North Mail. North Mail was the entity that owned the building, not
3 Dennis. Therefore, North Mail received nothing of value in exchange for the Property.

4 As stated by the Government:

5 Before the transfer North Mail owned a piece of property and had two owners
6 and shareholders who could bring an action against Dennis O'Brien for his harm
7 to it. After the transfer North Mail no longer owned the subject property, no
8 longer had owners and shareholders who could bring an action against Dennis
9 O'Brien, and was actually required to pay \$6,000 in monthly rent to continue
10 using the property that it had previously used for free, and also to pay off the tax
11 lien associated with property that it no longer owned.¹⁷

12 Without providing "adequate and full" consideration to North Mail, Defendants cannot
13 be considered "purchasers" under §6323 and therefore are not entitled to be exempted
14 from the federal tax liens which arose before the date of transfer and therefore take
15 priority over Defendants' interest. That is, under federal law the federal tax
16 assessments against North Mail created liens against all North Mail property on the
17 dates they were assessed, and even though two of the liens were not recorded against
18 the Property, they nonetheless take priority over Defendants' interest because they
19 were first in time and Defendants were not actually purchasers as defined by statute.

20 In their response brief Defendants argue that adequate consideration was
21 provided to North Mail because North Mail was listed as a purchaser of their shares
22 under the purchase agreement. Even if North Mail itself was actually the holder of
23 Defendants' shares after the transfer, which has not been shown, the only benefit of
24 such an arrangement nonetheless flows to the remaining shareholder, Dennis, because
25 it simply increases the value of his remaining shares. Defendants also assert in their
26 response brief that part of the consideration for the transfer was that North Mail was
27 released from the obligation to provide life insurance for them. A 1999 shareholders'
28 agreement indeed required North Mail to buy life insurance on the lives of each
shareholder sufficient to pay for the entire value of the shares of the respective

¹⁷Doc. 43 at p. 11.

1 shareholder upon his or her death. Defendants argue that when they gave up their
2 shares in exchange for the Property, North Mail was relieved of that financial obligation.
3 The court is not convinced that the release from that type of contractual obligation could
4 be deemed consideration since North Mail no longer had such an obligation once
5 Defendants gave up their shares to Dennis. Regardless, even if the release of such an
6 obligation could be consideration, it was not full and adequate consideration for the
7 Property. Defendants argue that under Alaska law, consideration should be considered
8 adequate as long as the disparity between the true value of the property and the price
9 paid is not so great so as to “shock the conscience.”¹⁸ However, in this situation, what
10 is meant by adequate and full consideration in the statute is defined by federal
11 regulation, and federal regulation requires that there be a reasonable relationship
12 between the value and the price paid.¹⁹ There is nothing in the record to show that
13 North Mail had actually purchased the required insurance and how much that insurance
14 would cost. That is, Defendants have not quantified the value. As the Government
15 points out in its reply brief, the cost of two life insurance policies in the amount of
16 \$250,000 would likely be minimal in comparison to the value of the Property.²⁰

17 Finally, Defendants argue that the transfer provided consideration to North Mail
18 because it enabled the company to continue its corporate existence. That is, had they
19 pursued their claims against Dennis for corporate malfeasance North Mail would have
20 had to liquidate its assets. The court agrees with the Government that removing the
21 threat of liquidation is not a tangible benefit that can be construed as legal
22 consideration.²¹

24 ¹⁸Doc. 49 at p. 9 (citing *Blumenstein v. Phillips Ins. Center, Inc.*, 490 P.2d 1213 (Alaska
25 1971)).

26 ¹⁹26 C.F.R. § 301.6323(h)-1(f)(3).

27 ²⁰See doc. 53 at p. 5 n. 3.

28 ²¹See doc. 53 at pp. 5-6.

1 Without sufficient consideration exchanged, Defendants cannot be considered
2 purchasers under § 6323. Therefore, the assessments made on May 9 and May 16
3 against North Mail created liens against the Property that take priority over Defendants'
4 subsequently acquired interest. As a result, of the \$436,654 in proceeds received from
5 the later sale of the Property, some of that amount should be used to pay North Mail's
6 employment tax liabilities for tax period December 31, 2010 (which was assessed on
7 May 9, 2011) and its unemployment tax liabilities for tax period 2010 (which was
8 assessed on May 16, 2011). As of March 13, 2015, these two liens totaled
9 \$253,384.70.

10 **B. Fraudulent Transfer**

11 The Government argues that all of the proceeds from the subsequent sale of the
12 Property, not just the portion needed to pay back the liens with priority, should be
13 turned over to the Government in order to partially satisfy the tax liens resulting from
14 North Mail's unpaid income taxes for years 2007, 2008, and 2009. While these income
15 tax assessments were made after the transfer of the Property from North Mail to
16 Defendants, the Government contends that the transfer of the Property was fraudulent
17 and thus should be completely set aside so that all \$436,654 of the proceeds can be
18 distributed to the Government in partial satisfaction of the judgment against North Mail.

19 A fraudulent conveyance is one that is intended to "hinder, delay, or defraud
20 creditors."²² "Existence of fraudulent intent is a question of fact."²³ The fraud need only
21 be proved by preponderance of the evidence, not clear and convincing evidence.²⁴ It is
22 "often established circumstantially with evidence of the badges of fraud."²⁵ These
23 badges of fraud typically include:

24 ²²AS § 34.40.010; *Gabaig v. Gabaig*, 717 P.2d 835, 838 (Alaska 1986).

25 ²³*Gabaig*, 717 P.2d at 838.

26 ²⁴*Id.*

27 ²⁵*Id.*

1 (1) inadequate consideration, (2) transfer in anticipation of a pending suit,
2 (3) insolvency of the transferor, (4) failure to record, (5) transfer
3 encompasses substantially all the transferor's property, (6) transferor
retains possession of the transferred premises, (7) transfer completely
depletes transferor's assets, and (8) relationship of the parties.²⁶

4 Many of the badges of fraud are present here. As discussed above, there was
5 inadequate consideration provided to North Mail. The record also makes clear that
6 North Mail was insolvent at the time of the transfer, if insolvency is reviewed in terms of
7 North Mail's ability to pay its bills when they became due:²⁷ paychecks were bouncing,
8 North Mail did not pay Kenneth O'Brien the \$3,000 a month owed to him, and there
9 were outstanding tax liabilities. Furthermore, it is undisputed that North Mail had no
10 significant assets besides the Property.²⁸ North Mail retained possession of the
11 premises after the transfer, and the transfer was not an arms-length transaction in that
12 Defendants were partial owners of the transferor.

13 However, there is a disputed issue of fact as to whether the transfer was done in
14 anticipation of a pending lawsuit. The Government says that Defendants were aware of
15 North Mail's serious tax problems because it sent Defendants a letter on November 10,
16 2010, notifying them that North Mail had not paid income taxes for the years 2007-
17 2009.²⁹ However, that letter is not in the record, and Defendants assert that they only
18 knew about some unpaid employment taxes. It is undisputed that Defendants received

20 ²⁶*Id.*; see also *Shaffer v. Bellows*, 260 P.3d 1064, 1068-69 (Alaska 2011).

21 ²⁷*Shaffer*, 260 P.3d at 1069 n.12 (noting that "Black's Law Dictionary defines insolvency
22 as 'being unable to pay debts as they fall due.'").

23 ²⁸Defendants assert that they believed North Mail had other valuable equipment and
24 assets at the time of the transfer, but nonetheless admit that they were only able to obtain
25 \$7,000 from North Mail equipment at a subsequent auction that was conducted in order to
collect on the judgment in their eviction action against North Mail when it failed to pay the rent
after the transfer.

26 ²⁹The Government also asserts that Colleen was aware of income tax problems
27 (Doc. 43 at pp. 5-6, ¶ 14), but the citation to the record is not accurate. The court presumes it
28 was trying to cite to Colleen's deposition testimony, Exhibit LY-2 and not LY-3, but regardless,
the pages cited are not included in the record.

1 a letter about the inquiry into unpaid *employment taxes* at the end of November 2010,
2 but that Colleen was never told how much was owed.³⁰ Defendants' declarations assert
3 that they were not aware of any federal liabilities except the unpaid unemployment
4 taxes and the one recorded lien related to those taxes and did not know North Mail
5 owed additional taxes until after the transfer.³¹ Indeed, because there was only one
6 recorded IRS lien on the Property for unpaid employment taxes and that lien was
7 recorded after Defendants had learned about the IRS inquiry into unpaid employment
8 taxes, drawing all inferences in favor of Defendants, they could have believed that the
9 recorded lien covered all that was owed.

10 Badges of fraud "must be viewed within the context of each particular case."³²
11 As the Alaska Supreme Court has said, "the mere presence of these indicia of fraud is
12 in itself insufficient to warrant summary judgment, since the badges are merely
13 evidentiary; they are circumstantial evidence of intent, no more."³³ Defendants maintain
14 that they took ownership of the Property for the purpose of cutting business ties with
15 Dennis and not for the purpose of defrauding the IRS. Before it can be determined
16 whether the conveyance of the Property was a fraudulent transfer, it will be necessary
17 for the trier of fact to determine Defendants' intent.

18 **V. CONCLUSION**

19 Based on the preceding discussion, the Government's motion for summary
20 judgment at docket 43 is **GRANTED IN PART AND DENIED IN PART**. Part of the
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22 ³⁰Doc. 51 at p.3, ¶ 8.

23 ³¹Doc. 51 at p. 6, ¶ 16; Doc. 50 at p. 4, ¶ 7.

24 ³²*Shaffer*, 260 P.3d at 1068.

25 ³³*Lane's Estate v. Lane*, 631 P.2d 103, 106 (Alaska 1981); *see also Sedwick v. Gwinn*,
26 873 P.2d 528, 866-87 (Wash. Ct. App. 1994) (concluding that the badges of fraud "are only
27 circumstantial evidence of intent, and in cases whether debtor denies that his or her intent was
28 to defraud, the issue cannot be conclusively determined by the trier of fact until it has heard the
testimony and assessed the witnesses' credibility.").

1 \$436,654 proceeds from the sale of the Property are to be distributed to the
2 Government in order to pay all sums associated with the tax assessments made prior to
3 the transfer of the Property. The court cannot order the remainder of the proceeds to
4 be distributed to the Government because the issue of whether the transfer of the
5 Property to Defendants was fraudulent cannot be determined through summary
6 judgment on the record provided.

7 DATED this 28th day of March 2016.

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9 /s/ JOHN W. SEDWICK
10 SENIOR UNITED STATES DISTRICT JUDGE
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